



STAFF REPORT ACTION REQUIRED

Report on the Recent Court Decision Dealing with the City's Holiday Shopping By-law

Date:	September 15, 2015
To:	City Council
From:	City Solicitor
Wards:	All
Reference Number:	

SUMMARY

This report provides information concerning a recent appeal decision of the Ontario Court of Justice regarding the interpretation of the exemption provisions found in the Municipal Code, Chapter 510, Holiday Shopping. In this case, Longo Brothers Fruit Markets Inc. (Longo's) was charged under the Holiday Shopping by-law for offering goods or services for sale on a designated holiday at two of its retail establishments. Longo's successfully argued at trial that it was selling goods or services "in the form of or in connection with prepared meals", an exemption provided in the by-law. The trial justice accepted this argument and dismissed the charges. The City appealed the decision, and the City's appeal was dismissed. On appeal, the Court referred to ambiguity in the language of the prepared meals exemption in the by-law.

RECOMMENDATIONS

The City Solicitor recommends that:

1. That City Council direct the Executive Director, Municipal Licensing and Standards in consultation with the General Manager, Economic Development & Culture and City Solicitor, to undertake a review and report to the Licensing & Standards Committee outlining the options available to address the concerns raised in the court ruling.

Financial Impact

There are no financial implications arising from this report.

DECISION HISTORY

A staff report dated November 24, 2006 advised that the upcoming proclamation of the *City of Toronto Act* would result in the *Retail Business Holidays Act* no longer applying to Toronto. The report recommended that Council adopt a by-law to maintain the status quo pending a consultative review and report back to the Economic Development Committee on a new regulatory framework governing holiday shopping.

<http://www.toronto.ca/legdocs/2007/cc/bgrd/20061205-cc1.3.pdf>

City Council passed By-law 8-2007 on December 6, 2006 (now Chapter 510 of the City of Toronto Municipal Code) under the authority of the *City of Toronto Act, 2006*, S.O. 2006, c. 11.

http://www.toronto.ca/legdocs/municode/1184_510.pdf

At its meeting on March 3, 2008 City Council received for information only Item ED12.5 that made three recommendations relating to the operation of retail stores on Public Holidays.

<http://www.toronto.ca/legdocs/mmis/2008/cc/decisions/2008-03-03-cc17-dd.pdf>

Subsequently, on May 11, 2010 City Council considered Item ED294 that made further recommendations relating to the operation of retail stores on Public Holidays. City Council referred this item for further consultation.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2010.ED29.4>

After a period of consultation, a staff report dated October 4, 2012 was prepared by the General Manager, Economic Development and Culture. This report was received by City Council on November 27, 2012. No further action was taken on this item.

<http://www.toronto.ca/legdocs/mmis/2012/ed/bgrd/backgroundfile-51034.pdf>

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2012.ED18.6>

ISSUE BACKGROUND

The holiday shopping by-law was passed under the authority of the *City of Toronto Act* (the "COTA"). Once the COTA was proclaimed, the *Retail Business Holidays Act* (the "RBHA") no longer applied to the City of Toronto. The RBHA is a provincial statute that requires retail businesses to be closed on statutory holidays unless they are exempted.

COTA limits the application of a holiday shopping by-law to retail establishments. It further provides that a holiday shopping by-law cannot apply to the sale or offering for sale by retail of "goods or services in the form of or in connection with prepared meals or living accommodation." (COTA, s. 97(3)).

On December 6, 2006, by-law 8-2007, "To adopt a new City of Toronto Municipal Code Chapter 510, Holiday Shopping, to provide for the regulation of shopping on certain holidays" was passed. In its recitals, by-law 8-2007 indicates that "it is desirable that the

status quo be maintained while Council undertakes a consultative process prior to implementing a new regulatory framework governing holiday shopping." Therefore, the existing prohibitions and exemptions found in the RHBA were duplicated in the City's holiday shopping by-law. Retail establishments selling "goods or services in the form of or in connection with prepared meals" are permitted to remain open for business on the holidays designated in the by-law. The prepared meals exemption in the by-law has not been amended or updated since its enactment.

COMMENTS

EVIDENCE AND DECISION AT TRIAL

Longo Brothers Fruit Markets Inc. ("Longo's") was charged on September 2, 2013 with two counts of offering goods or services for sale on a holiday, contrary to the City of Toronto Municipal Code, Chapter 510, s.510-2. A trial was heard on July 24, 2014, and the presiding Justice of the Peace rendered her decision on October 28, 2014.

There was no dispute before the court that the two Longo's locations were retail establishments open for business on the designated holiday. The case turned on the question of whether Longo's could establish that it was permitted to remain open for business on a designated holiday because it satisfied the exemption provided in the by-law for premises selling goods or services in the form of or in connection with "prepared meals". Under the *Provincial Offences Act*, the defendant bears the legal burden to establish that an authorization or exemption applies.

The evidence in this case established that the entire retail establishments were open for business on Labour Day. The evidence established that several hundred prepared meals options were available for sale (for example, sushi, pizza, salad bar, sandwiches, ready-to-serve meat and seafood, side dishes). One location also contained a full-service restaurant within the retail establishment (Corks by Longo's). On the other hand, the evidence also revealed that a number of non-food items were available for sale (including magazines, lottery tickets, flowers, detergent, and light bulbs).

The Justice of the Peace at trial was satisfied that the charges had been proven beyond a reasonable doubt. However, the court was also satisfied, on a balance of probabilities, that Longo's had established an exemption to the charges in that they were in both instances selling goods in the form of or in connection to prepared meals, stated as follows:

I apply a broad interpretation...Section 510(4) that lists exemptions does not specify what type of business may sell prepared meals and which may not...This section does not contain any specific criteria that must be met in order to offer the products and services....I cannot identify any prohibition in a lawful exemptions that applies to preclude a specific category of business from being open and selling prepared meals on the defined holidays...Additionally, there is no

language that defines, circumscribes or restricts, "selling goods and services in the form of or in connection with" the prepared meals that are permitted by section 510(4). That would support the intention of the municipal legislators to give broad permission to a range of establishments in a large and diverse urban community as the City of Toronto is to offer prepared meals and connected goods or services.

DECISION AT APPEAL

The City appealed the trial court decision, on the basis that the Justice of the Peace erred in law in her interpretation of the exemption. The appeal was heard on June 17, 2015 before His Honour Mr. Justice Zuker of the Ontario Court of Justice. The City argued that the court should give a broad and purposive interpretation consistent with the purpose of the by-law. To interpret the exemption too broadly is to override the exemption in the first instance. Further, it was argued that not all of the retail inventory could be considered goods or services "in the form of or in connection with" prepared meals. The court failed to consider whether the entirety of goods available for sale fell within the exemption.

After reviewing the case law pertaining to the standard of review on appeal for errors of fact, mixed errors of fact and law, and errors in law (where a standard of correctness is applied), the court dismissed the City's appeal:

In any event, if we get to (i) of course – and again, this is what the Court has a problem is the interpretation, and I think it's ambiguity, premises selling goods or services in the form of or in connection with prepared meals. I think based on the case law that I've referred to...and the Municipal Code, and all the circumstances, I'm going to dismiss the appeal.

It remains unclear what evidence is necessary to establish that the exemption is met on the balance of probabilities. That is, how far does the defendant have to go to establish that it is a premise "selling goods and services in the form of or in connection with prepared meals"? Is it sufficient that some, most or all of the retail inventory meet the definition?

In addition, given that the original exemption was drafted in the early 1970's it is likely the case that multi-purpose grocery stores such as Longo's were not contemplated at the time of drafting, where an extensive prepared meals inventory is offered for sale alongside other more traditional grocery store inventory. In some circumstances, the City has required premises to 'rope off' its non-permitted inventory in order to meet the "small retail establishment" exemption. In areas designated as tourist areas, similar retail establishments are permitted to remain open on holidays.

Recognizing that there have been changes to the manner in which retail businesses operate, and given the comments of the Court with respect to ambiguity in the current language, it would be appropriate to undertake a review of the bylaw.

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SIGNATURE

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